No. 14.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

MAURICE WISE ET AL.,
Defendants in Error.

vs.

CHAS. M. JEFFERIS,
Plaintiff in Error.

POINTS AND AUTHORITIES OF PLAINTIFF IN ERROR.

TOOLE & WALLACE,
Of Counsel for Plaintiffs in Error.

Filed Jany 12, 1892

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STATEMENT OF FACTS.

Prior to March 18th, 1889, Jacob E. Landsman, as the successor of J. E. Landsman & Co., and the surviving member of the firm, was conducting a business on Main

street, in the city of Helena, known as the Northwestern Clothing House. He was at the time indebted to the First National Bank of Helena in a sum upwards of $8,000, and also to plaintiffs (save and except the firm of Turner & Burleigh) —the other plaintiffs being Chicago creditors—in the sum of about $7,400. One William Oliver, as agent for all of the plaintiffs, except Turner & Burleigh, the latter being his attorneys, on the morning of March 18th, 1889, procured from said Landsman a bill of sale of all of his merchandise, trade fixtures, and all of the firm assets of J. E. Landsman & Co., and assumed to take possession of the stock thereunder. The power of sale expressed a consideration upon its face of $12,500, and Oliver claimed this as the amount of the indebtedness owing to the Chicago creditors. In the afternoon of the same day the defendant Jefferis, who was the sheriff of Lewis and Clarke county, received a writ of attachment, regular upon its face, issued in a suit brought in a court of general jurisdiction, to-wit: the District Court of the First Judicial District of the State of Montana, in and for Lewis and Clarke county, wherein the said First National Bank of Helena was plaintiff, and J. E. Landsman & Co., were defendants (which suit was brought to recover the said bank indebtedness, and in which, before the issuance of the writ in question, a sufficient complaint had been filed, summons sufficient in form duly issued and served), seized and levied upon and took all of the goods of Landsman & Co. [In the attachment suit the defendant, J. E. Landsman & Co., allowed judgment to go against them without objection for the full amount of the debt claimed, which judgment was rendered in April, 1889.] And after so taking the same, demand was made by Oliver, agent, on behalf of plaintiffs, for their possession, and a little over a year and a half thereafter, in 1890, the present suit was brought to recover the same of the sheriff.

The defendant, Jefferis, justified the taking of the goods under the writ in question, offering to prove that the sale to Oliver was fraudulent, and that the same was used for fraudulent purposes as against the other creditors. At the conclusion of the trial the court instructed the jury that the defendant, though a sheriff, and assuming to act as such, could not justify the taking of the goods in question from the possession of the plaintiffs under the writ of attachment above named, because of the fact that the undertaking filed in the action before the issuance of the writ of attachment was in its form of obligation not in compliance with the statute, and therefore that the writ was void and would not be a justification to officer as against a third person in possession, thereby taking away from the jury all the questions of fact in the case, determining the matter adversely to the defendant, and leaving the sole question with the jury to determine the amount which the plaintiffs should recover, which the jury found to be the amount of the actual debt as claimed by the defendant, and not the fictitious amounts claimed by the plaintiffs in their pleadings.

POINTS OF LAW.

Reserving for after discussion the minor exception presented in the record, we first consider the action of the court below, as last above stated, in taking the case from the jury.

The statute in force at the time of the issuance of this writ (Section 182, p. 104, Mont. Compl. St., 1887), prescribed the form of undertaking thus: for the payment of "all damages he" (the defendant) "may sustain by reason of the issuing out of the attachment." (It may be stated in passing, in the section of the original bill from which Section 182 was compiled, as passed and

approved February 23rd, 1881, the word "suing" not "issuing" appears, and therefore the use of the latter word was an error of the compiler, perpetuated from the erroneous print of the session laws of 1881.)

This Act of 1881 was an amendment of Section 180, page 72, Revised Statutes of 1879, in which last section the language was: "All damages he may sustain by reason of the wrongful suing out," etc. And the undertaking required by the clerk before the issuance of this writ was upon a printed form and followed the language of the Act of 1879, (record p. ——.) The defect in this undertaking then, on account whereof the court held the writ void and refused to allow the officer to justify under it, lay in the use of the words "wrongful suing," instead of "issuing" or "sueing" whichever the amendment might be held to be. The view of the court being that, although the writ was fair upon its face, the rule whereby such a writ is a sufficient protection to the officer executing it, had no application when the officer was sued by a stranger; but that as against such stranger he must show that it was supported by a perfect bond.

This conclusion, while it may find support in some decided cases, is not in consonance with reason, works a manifest hardship, when applied in connection with other recognized rules of law; is unjustifiable on principle, and is expressly repudiated by the Supreme Court of the United States, the court of last resort in this jurisdiction.

The premises on which a conclusion is reached are:

First—The writ is necessary to connect the officer with the creditor and can give him the latter's rights and defences.

Second—A perfect bond is a jurisdictional matter and its absence renders the writ absolutely void.

Third—A writ fair on its face, but void for extraneous causes, is unavailing for any purpose, and will not even

serve as a protection to the officer of the court from which it issued.

The first premise is a sound one, the two latter absolutely untenable and utterly false. The former is logical because a naked trespasser could not justify by showing ownership in some third person, *i. e.*, a second trespasser could not deprive a first of possession, but the latter would prevail by virtue of mere possession alone as against everyone not showing a better right, either in himself or in his principal, if acting in a representative capacity. For the reason then that the defence of fraud as against a debtor's vendee in possession is available to none save a creditor or his representative officer acting under his writ; and for the sole purpose of relieving himself of the attitude of a trespasser and putting himself in a position where he may be entitled to question the alleged title of plaintiffs to the goods, and to show that as to him they are the goods of the defendant in the writ, he must show that his principal, the creditor in the writ, is actually a creditor of the defendant. In other words, he must prove as an independent fact the debt from which the relationship of creditor and debtor springs. Having done this he next establishes relationship to the creditor by the writ, fair on its face, procured in the suit of the creditor and directed and delivered to him from a court of general jurisdiction whose officer he is. Such writ connects him with the creditor not only as between himself and the latter, but also as between himself and the debtor; and entitles him to pursue the latter's property in whomsoever's hands he may find it as freely as could the creditor himself, with this additional privilege accruing to him which his principal, the creditor, does not share in; namely, of claiming protection for acts done under the writ, though the latter be voidable or even void, provided the latter be on its face apparently valid. The principal,

however, in those states where the preliminaries are jurisdictional, is held answerable because he himself has conducted the proceedings which rendered the writ void.

Keer vs. Mount, 28 N. Y., 659.

The officer is exonerated because he is in no sense responsible for the preliminary steps; the writ is to him the mandate of his court, which, as its officer he is bound to obey. For had an officer, receiving such a writ, refused to levy on property of the debtor, confessedly he would thereby render himself liable to the creditor plaintiff.

47 Am. D., 148.
20 Vt., 479, S. C. 50 Am. D., 52.

And our own statute (sec. 855, p. 873) would seem to declare the rule above announced. Certain it is that if he be held bound to serve such a writ he should be permitted to claim its protection. Or, if not protected by it, he should be entitled to refuse to serve. There can be no justice in requiring him to commit what the law will construe as a trespass. True, there are cases holding that before infringing on the possession of a stranger he may require an indemnity bond, only as against the title in the goods seized, however, and not as against the latent defects in the writ.

But these very cases concede that when the bond is furnished him he is no longer justified in refusing to levy. But as this is a mere official privilege, it has been contended that nothing short of a writ of replevin, naming specific articles, will warrant an officer in taking goods from a stranger to the writ. Hence, that in so taking them under a writ of attachment, the officer departs from his writ, becomes a mere trespasser, and his act, not being within the mandate of the writ, is not official, and does not entitle him to claim official immunity for it. The

Supreme Court of the United States has set this contention at rest, however, having expressly declared that the act of an officer in taking from the possession of a stranger goods of the defendant in an attachment writ is as much an official act as if he took them from the possession of the defendant himself, and that no distinction whatever exists between the two classes of cases.

Lammon vs. Feuseir., 111 U. S, p. 17, 21.
See also, Casenach vs. Conno, 5 Binney, 184.
Greenfield vs. Wilson, 13 Gray, 384.
State vs. Jennings, 4 Ohio St., 418.
12 Neb., 580.
27 Tex., 23.
3 Bush, 62.
64 Mo., 185.
11 Iowa, 329.
4 N. Y., 179.

It is the universal rule that, as against the defendant in the writ, if fair on its face, its mere production justifies the officer.

What then is the interest of the stranger in possession, that should entitle him to demand more than the defendant? He is concerned in two matters only:

a In knowing that the person litigating with him is one having a right to assail his title, *i. e.*, a creditor or one acting by his authority.

b In determining whether the goods are his or the debtors.

The proof of the debt and the production of the writ in a suit on the debt establishes the former, while the fraud or fairness of the sale would determine the latter. If he be the actual owner, then he recovers as against the writ, whether void or valid. If not the owner, he gets an advantage that the real owner, the debtor, would not be permitted to have, secures a title by a technicality, and defrauds a creditor of the real owner.

Moreover the undertaking provided for in Section 182, *supra* is conditioned solely for the indemnity of the defendant in the attachment suit, and he would be the only one injured in the event the clerk had entirely neglected his duty and issued the writ without requiring any undertaking whatever. And so the privilege of objecting to either the lack of or defective character of the undertaking is purely personal to the defendant, and to him alone, a creditor or other third person not having this privilege, even when appealing in the original suit for that purpose.

Drake on Attach. Section 143.
Van Orsdale vs. Krun, 9 Mo., 397.
Wigfall vs. Byne, 1 Rich. L. (S. C.) 412.

If then plaintiff could not have maintained such an objection in the original suit itself, on what theory shall they be permitted to do so in a collateral action, and thereby deprive an officer of the protection of a writ fair on its face, and to which he owed obedience? Why then should this stranger's right be greater than the defendant's in the writ, for whose indemnity only the bond is furnished, and what privilege is there then personal to them so that they ought to be permitted to question its sufficiency at all, much less by a collateral attack?

Thus far we have been considering the matter as if the undertaking were a jurisdictional matter and the writ actually void, because of its departure in the use of the word "wrongful" from the statutory condition. No such consequences result from this undertaking, however. A construction of this statute, as to the effect of such an undertaking, by the Supreme Court of Montana, though given before statehood, if in harmony with expressed views of the Supreme Court of the United States, would be followed here. Our court had occasion to pass upon

such an undertaking—word for word, the same—on appeal from an order dissolving an attachment bond on it. They held the undertaking to be merely defective; upheld the levy; set aside the order dissolving, and declared that the plaintiff should have been permitted to cure the defect by filing a new undertaking. Hence they determined that the undertaking was not jurisdictional; and that the writ was not avoided by the defect.

Miles vs. Pierce, 5 Mont, 549.

That was a case, too, wherein the defendant in the writ, made a direct motion before answer and in the original suit, to set aside the levy, a proceeding directly by the party concerned, to avail himself of whatever privilege he had. And yet the Supreme Court regarded it as a mere defect, the subject of amendment, and so not even making the writ voidable at the defendant's option.

Again, the undertaking and the affidavit bear very different relations to the writ under our statute, the provisions of which in this respect are peculiar. For, while it is provided that "no writ of attachment shall be issued until the plaintiff, his agent, or attorney shall file with the clerk an affidavit," etc., (sec. 180, p. 109, Compl. St.), the same limitation is not enforced as to the undertaking, but, as to the latter, it is simply provided that "before issuing the writ the clerk shall require a written undertaking," etc., (sec. 182 *supra.*). So that while the filing of the affidavit is made a prerequisite to the issuance of the writ, such is not the case with the undertaking. But it simply imposes a duty on the clerk to require it. And so adverse decisions based on defects in affidavits could be distinguished from the case of a defective bond. Nor is it required that either the affidavit or bond be attached to the writ. They are simply filed with the clerk, and the officer is supposed to know nothing whatever of them.

Our statute provided the time within which such defects must be taken advantage of by motion to dissolve, and expressly limits the right to object to the period prior to answering (sec. 200, p. 109, Compl. St.). And even in the absence of such a statute, the courts have uniformly declared that a defective bond must be taken advantage of before plea or answer, or else is deemed waived.

Drake on Attach., sec. 144.
40 Mich., 543.
21 Mo., 296
5 Ala., 213.
19 Greene, 366.
4 Ill., 21.
85 Ill., 138.

In the case at bar, the defendant in the writ not only did not take advantage of the insufficient undertaking, but expressly waived it by permitting judgment, as well as by seeking and consenting to the appointment of a receiver of the goods (as developed in the proofs offered in Bill of Exceptions, No. ——, which were rejected by the Court).

Del Col vs. Arnold, 3 Dallas, 333.

And under the rule laid down in Pierce vs. Miles, *supra*., even had he moved to vacate the attachment before the expiration of time for answering, the court would have afforded the plaintiff an opportunity to amend the undertaking and correct the defect.

We insist then that reason, as well as adjudicated cases, repudiate the doctrine declared by the court below, and deny that an officer can ever be deprived of the protection afforded by process good upon its face on account of defects in preliminary proceedings or failure of the clerk

to perform his duty, whether action be brought by the defendant, in the writ against the officer, or by a stranger.

14 Wis. 93
23 Wis. 365.
44 American D. 76.
Cody vs. Ware, 6 Iredell Law, 991.
34 American D. 509.

And whatever may be the contradiction in decided cases upon the foregoing proposition in the State courts, the rule as last above announced has been settled, and forever put at rest by a line of decisions of the Supreme Court of the United States, in which, uniformly, the doctrine erroneously adopted by the court below, has been repudiated, and the more logical rule, which we insist upon, has been unequivocally declared to be the rule of guidance in this jurisdiction.

109 U. S., 217.
10 Wallace, 300.
14 Wallace, 613.
14 Howard, U. S., 586 opinion page 588.
10 Peters, 449.
2 Howard, U. S., 319.

While Mr. Drake, in his work on attachments, expresses a contrary opinion he relies upon cases from the Supreme Court of New York, the Hand case in 7th California, and case of Matthews *vs.* Dinsmore, 43 Michigan. The latter case is the identical case which is reversed in 109 U. S. The New York Supreme Court cases declare a rule which seem to have been reconsidered in the Court of Appeals; see

2 Comstock, 477.

And Nebraska has followed Mr. Drake and the cases above referred to. And so all adverse decisions upon this question will be found to sustain themselves by the very cases cited in brief of counsel for respondent.

Matthews vs. Dinsmore, 109 U. S. *supra*.

For reference to Drake and cases relied on by him, see

21 Neb. 491.

The second point presented is involved in error No. 4 (see transcript, pages 44 to 46), and presents the question whether the statement of the sheriff, in his return, that he took the property from the possession of Oliver, is conclusive, so as to forbid him for assailing the nature of that possession in the right of the creditor. We submit that there is a marked distinction between bare possession and the possession defined and required by our statute of frauds, for as against a creditor and the sheriff, in his writ, the delivery must have been immediate and the possession must have been actual, continuous and notorious, and open to all observers.

4 Pac. Rep. 244.

Error No. 5 (record, pages 46 to 49 inclusive) involves the action of the court upon a collateral instruction to the preceding one; if the preceding instruction could be justified, then this error assigned would be immaterial, but if any, we submit that the court in its instruction disregarded the rule as to equivocal possession.

Error No. 6 (record, page 50) treats the question considered, as developed by uncontradicted testimony, and utterly ignores the evidence of Landsman as to existence of any debt whatever to Turner & Burleigh. That the court could not rightfully treat this testimony of Landsman as not existing, see:

It might be said that the bill of sale would estop Landsman in a suit, to which he was a party, from denying a debt, but he was a mere witness in this suit, and the creditor was entitled to know the actual facts regardless of Landsman's personal estoppel.

Error No. 7 (record, pages 51 to 56) involves the right of the sheriff to justify by showing that by other process, and the court having jurisdiction of these chattels, that is, by *vis majoris*, the sheriff was compelled to and did surrender the goods to a receiver.

a We submit that this would constitute a justification of the sheriff, because he was bound to obey the order directing a surrender of these particular goods to the receiver.

26 Cala., 108.
2 Am. St. Rep., 400.
100 Am. Decision, 744, note.
17 Wallace, 87 and 96.
147 Mass., 385.

b Because the testimony was admissible to show recognition of the levy by Landsman and the existence of the debt, though this was established elsewhere by the plaintiffs by the production of the judgment against Landsman.

Error No. 8 (record, pages 59 to 62) involves the action of the court below permitting an amendment to plaintiffs replication at the conclusion of their proofs and when they had rested, whereby the entire nature of the action was changed. Upon this point we submit, that the complaint sought to hold the defendant as an individual for an alleged trespass, while the amendment assumes to admit his official character, but that for an official act the statute of limitations would have run prior to the date of the amendment; also in that the action was thereby changed from one for recovery of the goods

themselves to one for damages on account of their taking, that is, from replevin to trover. That for these reasons the change could not be made, see:

14 New Jersey Eq., 431, 435.
71 Ala., 563.
79 Mo., 88.

Again, as the proofs existed, prior to the amendment, the court was without jurisdiction, under the doctrine announced.

24 How., 450.
20 How., 583 and
Covell vs. Heyman, 111 U. S., 177, 184.

Being then at the time without jurisdiction, it had no power to permit the amendment in question.

Crehove vs. Ohio & C. Railway Co., 131 U. S., 243.

The foregoing presents the various errors that we desire to insist upon. Errors one and two involved in the first exceptions, while they present a question interesting as a matter of practice, we do not press upon the court at this time, but we respectfully submit, that for the reasons above set forth, and particularly because the court erroneously took the case from the jury, because of the alleged defective undertaking, that manifest error was committed upon the trial, that the case should be reversed and sent back for trial, to the end that the defendant may be permitted to establish his rights under the rule established by the Supreme Court of the United States.

Respectfully submitted,

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